

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
**601 NEW JERSEY AVENUE N.W., SUITE 9500**  
**WASHINGTON, D.C. 20001**  
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January 28, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. CENT 2009-588- M
Petitioner	:	A.C. No. 29-02269-189438
	:	
	:	Docket No. CENT 2009-757- M
v.	:	A.C. No. 29-02269-189806
	:	
MAINLINE ROCK & BALLAST, INC.,	:	Torrance Quarry
Respondent	:	

**DECISION**

Appearances: Tina D. Juarez, Esq., Office of the Solicitor, Dallas, Texas for Petitioner;  
Christopher G. Peterson, Esq., Jackson Kelly, Denver, Colorado

Before: Judge Moran

On April 21, 2009 miner Edelberto Avitia was pulled into a return roller of the grizzly conveyor at Respondent Mainline Rock and Ballast’s Torrance Quarry (“Mainline”). Mr. Avitia received significant injuries and was evacuated via helicopter from the mine to a hospital. He was fortunate to have survived the event.<sup>1</sup> Subsequently, the Mine Safety and Health Administration (“MSHA”) conducted an investigation of the incident, resulting in these civil penalty proceedings brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”).

MSHA alleges two violations arising out of this event.

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<sup>1</sup>As later described by plant superintendent Mike Harris, Avitia was indeed lucky not to have been fatally injured. This is because Harris estimated the space between the return roller and the bottom of the conveyor where Mr. Avitia got caught to have been “roughly seven inches.” Tr. 258-259. The arrangement consisted of the roller and the belt on top of that return roller and there is a cross member piece of two-inch angle iron and there was about seven inches between that space, creating a pinch point. Tr. 260.

First, it contends that the Respondent violated 30 C.F.R. § 56.14107(a). That section, entitled, “Moving machine parts,” provides that:

Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.<sup>2</sup>

Second, MSHA contends that Mainline violated 30 C.F.R. § 50.10. That section, entitled, “Immediate notification,” provides that:

The [ mine] operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving: (a) A death of an individual at the mine; (b) An injury of an individual at the mine which has a reasonable potential to cause death; (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or (d) Any other accident.<sup>3</sup>

For the reasons which follow, although the Court does *not* find that this incident occurred in the manner contended by MSHA, it still affirms both violations and increases the penalty for the notification violation.

## **I. Findings of Fact and Conclusions of Law**

### **A. Failure to guard moving machine parts; the alleged violation of 30 C.F.R. § 56.14107(a)**

Miner Edelberto Avitia (“Avitia”) was working as a loader man at Mainline’s Torrance Quarry,<sup>4</sup> a position he had held for about two or three years. Tr. 34. His duties were varied but, as pertinent here, they included shoveling accumulations of dirt from around the grizzly conveyor. In fact, the parties do not dispute that Avitia’s duties included cleaning up such accumulations around the area of the jaw crusher and the grizzly conveyor.

In order to fully appreciate the circumstances of this accident, one needs to have the

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<sup>2</sup>The same standard, at § 56.14107(b), provides that “Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.” Neither side has claimed that this provision applies.

<sup>3</sup> For purposes of this citation, the term “accident” is defined in section 50.2(h) as “[a]n injury to a miner which has a reasonable potential to cause death.” 30 C.F.R. § 50.2 (h)(2).

<sup>4</sup>The operation provides ballast for application alongside railroad tracks. Tr. 531.

following exhibits for viewing along with this written description: Gov. Ex P 4,<sup>5</sup> and Respondents Exhibits R 11 and R 7. Exhibit P 4, a photograph, shows the grizzly conveyor with Plant Superintendent Mike Harris standing in front of the approximate location of the return roller in which Avitia got caught. In the photograph, three guards are behind Mr. Harris; there is long, “rectangular” guard immediately behind him and he is standing approximately in the middle of that guard. To the left of that guard is what appears, at least in P 4, as a “square” shaped guard which is much shorter than the rectangular guard. R 11 shows a different perspective of that “square” guard. That is the view of the square guard if the person in R 6 were to walk towards the square guard and then go behind it. Thus, one sees that the “square” guard is actually a box shaped guard surrounding the tail pulley.<sup>6</sup>

Although Mr. Avitia testified<sup>7</sup> that he became caught in the pulley at a location some distance to the right of the individual in P 4 and that this occurred while he was shoveling accumulated dirt under the conveyor at that point, the Court finds that is not the way the accident occurred. On the basis of the preponderance of the reliable testimony, the Court finds that Avitia became ensnared in the return roller which, as noted, is right behind Mr. Harris, in P 4. Further, this accident did not occur through Mr. Avitia shoveling dirt accumulations from beneath the conveyor at the location where Mr. Harris is standing. Avitia maintained that he was digging while on his knees, shoveling as far as he could reach under the conveyor, but asserting that he was *outside* the conveyor frame, just as Mr. Harris is shown to be outside the conveyor in P 4. Avitia stated that only his hands and arms were extended under the conveyor and consequently he was reaching under the conveyor but only up to his shoulders. Thus, by Avitia’s recounting he would have been kneeling at some location outside the I beam framework, just as Mr. Harris is shown to be outside that framework.

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<sup>5</sup> Respondent’s Ex R 6, is the same photo, but with different markings on it.

<sup>6</sup>The ‘third’ guard in P 4 is near the end of the right side of the rectangular guard but *below* the supporting metal frame. Mr. Avitia marked “EA,” his initials, on P 4, which is near the location of that third guard. That third guard is not significant to the issues in this case.

<sup>7</sup> An interpreter translated the questions and answers to and from Mr. Avitia, translating them into English. However, one should not conclude that Avitia was completely unable to speak and understand English. Both from the Court’s observations during Avitia’s testimony, including nodding when English was spoken, and testimony from Respondent’s witness, Mr. Olsen, it was clear that for the most part Mr. Avitia’s ability to understand and respond in English were sufficient for communication. Thus, the Court agrees with Dwayne Olsen, Mainline’s lowdown superintendent at the Torrance Quarry, in his assessment that Mr. Avitia’s command of English seemed passable. Observing him during the course of the hearing, the Court noticed that Mr. Avitia seemed to be understanding the communications in the proceeding quite apart from any assistance from the translator. Therefore, the Court finds that Mr. Olsen’s statement that he always spoke to Mr. Avitia in English, that he seemed to understand things that were said to him and that Olsen used Avitia as a *translator* for communicating with other Spanish speaking employees with less command of English, (Tr. 515-516) are all reasonable conclusions to make about his command of English.

However, the Court finds that is not what occurred. Instead, Mr. Avitia went *underneath* the metal support frame and was thus *under* the conveyor belt when the accident occurred. This action on his part was prompted by a rock or some sort of material having become lodged between the belt and the conveyor I beam frame.<sup>8</sup> R 5, though it has some acknowledged errors<sup>9</sup> in its depiction of the conveyor at the location of the injury, is still useful to understanding the location and point where Mr. Avitia became caught. In any event, while under the conveyor at that location, and while trying to free a lodged piece of rock or other material, Mr. Avitia's shovel got caught between the belt and the return roller and, in an instant, that action caused Mr. Avitia to become drawn into it before he could release his grip on the shovel.<sup>10</sup> In fact, while there was some disagreement about the exact location where Avitia started his digging work, there is no conflict about where he ultimately became lodged, as he agreed that the conveyor belt was over his back and the roller was against his stomach. Thus, the bold black arrow in the bottom drawing of R 5 shows the point where Avitia became lodged.

Although Jeremiah Carpio was next called as a witness, the Court concludes that his testimony was not valuable to the determination of the facts in this case.<sup>11</sup>

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<sup>8</sup>Avitia himself stated that dirt could accumulate and “turn into like a rock and it would make the band stop or the belt stop.” Tr. 57.

<sup>9</sup>Exhibit R 5 was conceded to be inaccurate in that the cross member shown in the upper drawing is actually not as depicted in that drawing. Harris agreed there are inaccuracies in R 5, the drawing of the grizzly conveyor. Further he had no input to its creation. Tr. 404. Harris drew the correct location for this in the bottom drawing on R 5, using a red pen. Tr. 349. Another exhibit, R 7, shows the correct location of the cross member in relation to the roller where the accident occurred.

<sup>10</sup>On P 4, Avitia marked his initials and the number 1 to show where he had been shoveling accumulations from under the tail pulley *before* the accident occurred. R 11, also has the initials “E. A.” and the number 1, showing the same area he shoveled before the accident, but from a different perspective. Both P 4 and R 11, also mark where Avitia contended he was located when he became ensnared by the return roller. Again, the Court finds that Mr. Avitia is incorrect about this recollection.

<sup>11</sup>Jeremiah Carpio began his employment for the Respondent initially as a laborer, then worked as a haul truck loader and after that he became the plant operator. Tr. 120-122. In that last job, he runs “the plant, the quarry, the crusher.” Tr. 121. In several aspects of his testimony Mr. Carpio was not a credible witness. For example, in describing his job as the plant operator he stated: “We walk the plant and inspect it, you know, have to start the generators *and make sure everything's guarded* before I get it running.” Tr. 121. (emphasis added). His supervisor is Mike Harris, the plant superintendent. Tr. 122. Mr. Carpio stated that, in getting the plant up and running each day, he walks the plant and he “check(s) all the guards, make sure they're still up, they haven't fell . . .” Tr. 124. Mr. Carpio described Mr. Avitia's job in April 2009 as an “oiler.” Tr. 125. Although that job involved greasing bearings, when Avitia was done with that, Carpio agreed,

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“he would dig.” Tr. 126. By that, Mr. Carpio meant that Mr. Avitia would shovel piles of dirt that would fall from the conveyors and off the rollers. Tr. 126.

Mr. Carpio maintained that although he saw Mr. Avitia shovel dirt near conveyors that were running, this occurred only where they were guarded. Tr. 127. He also asserted that there were guards on every conveyor part that moved. Tr. 127. Consistent with that assertion, he maintained that all parts of the grizzly conveyor were guarded. Tr. 127. However, in using that description he meant by ‘guarded’ that term included ‘guarded *by location*,’ which he expressed as “at least three feet from the ground, where your hands can’t get under them if you stand right by them.” Tr. 127-128. Carpio thus believed that, if there was only three feet or less between the ground and moving machinery, there is no need to have a guard. Tr. 129. Despite that stance, he stated that no one told him guards were not needed in such situations and he could not explain how he came to know of his ‘three foot rule’ for guards. Tr. 130. In addition, he asserted that the grizzly conveyor *was* guarded but only in the sense that the conveyor frame (or “channel”) constituted a “guard,” so that, in his view, one could not access the roller. Tr. 148.

Carpio was present on the day of the accident and he asserted that Avitia told him that he would be digging under the jaw and the grizzly that day. According to Carpio, he told Avitia not to dig there but that Mr. Avitia insisted that he would dig there anyway. Tr. 132-133. Thus, according to Mr. Carpio, Mr. Avitia, defied his warning. Unbelievably, Mr. Carpio maintained that he said nothing else in response to Mr. Avitia’s alleged defiant response. Tr. 134. Adding to the lack of believability of this assertion, Mr. Carpio, when then asked if, pursuant to his conversation with Mr. Avitia, that he understood that Mr. Avitia was going to be digging by the grizzly conveyor, he responded “no” because he “strictly told [Avitia] not to dig under the grizzly.” Tr. 134. Later, Mr. Carpio, added without a question prompting him, that he was not Avitia’s boss at the time he told him not to dig under the grizzly. Tr. 136. This was apparently volunteered to explain his silence in response to Avitia’s alleged defiance.

Carpio did advise that the purpose of digging under the conveyors is to clean the ground below, so that dirt doesn’t hit the bottom of the conveyor belt. Tr. 135. Mr. Carpio stated that while people dig under other conveyors, he has never dug under the grizzly conveyor, nor has he ever seen others do that. Tr. 140. Although Carpio stated that he had dug under the jaw conveyor and seen others do that too, he expressed this was acceptable because it is guarded and that all the rollers are guarded on the under jaw. Tr. 147.

Importantly, Mr. Carpio asserted that there *had* been expanded metal on the roller where Mr. Avitia got caught, but that “it had fallen off” before his accident. Tr. 150, 151, and the top

photo in Exhibit P 9. The guard, consisting of expanded metal, protects so that “nobody sticks their hand up in it.” Tr. 151. Mr. Carpio believed that the guard had fallen off that day, before Mr. Avitia’s accident. Tr. 151. Although Mr. Carpio stated the accident still would have occurred, even had the guard been present, he based this on his view that Mr. Avitia’s coveralls would have “got stuck in there.” Tr. 152. However, this does not seem likely, because the witness agreed that

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Mr. Avitia would have had to go through the expanded metal too. Tr. 153. Mr. Carpio stated that he has observed others dig underneath the overland conveyor but that not all the rollers under that conveyor are guarded as those “below three feet aren’t.” Tr. 154. It was his position that one can’t get to such unguarded rollers unless one crawls into such areas. Tr. 154.

Placing emphasis on his statement that the return roller which caught Avitia was guarded, Mr. Carpio marked on Exhibit R 6 the location of the guard depicted Ex. P-9. Carpio stated he knew the location of that guard because *he* was the person who installed it. Tr. 165. This was, according to Carpio, the roller in which Mr. Avitia was caught and it was the same area that he told Avitia not to dig. Tr. 165. Although in his earlier testimony Carpio stated there was no guard there at that time, later he speculated that perhaps Avitia “busted” the guard when he went through it. Carpio based this revised claim on the assertion that the expanded metal guard was on the ground. Tr. 165. However, the record contains no photographic evidence of such a guard and Carpio was the only witness who claimed there was such a guard present.

Carpio also maintained that Avitia twice admitted to him that upon seeing a rock stuck in the roller he tried to remove it with his shovel and that both his shovel and coveralls got caught up by the roller. Tr. 168. He maintained that Mr. Avitia regretted trying to remove the rock without shutting the equipment down first. Tr. 170. He further asserted that Mr. Avitia expressed regret over his actions and that he recognized that he should have called to have the conveyor shut down. Tr. 172. Mr. Carpio also stated that the mine had a lock out, tag out policy and that there was a meeting about that policy in February or March that year. The conveyor and grizzly would be shut off and the equipment locked and tagged out if a rock became stuck and this practice was also done for maintenance reasons.

Mr. Carpio reiterated his view that “guarded by ground” refers to applying where the height is 36" or less, in which cases no guard is needed. Tr. 176. He maintained that the company’s training manual provided that one is not to get under the conveyor where the height is 36" or less, though no exhibit was offered to support that claim either. He also asserted that, while shoveling under the belt to deal with accumulations can occur, the belt would first be shut down, at least in those locations where there was no guard present and it was considered guarded by location. Tr. 178.

When the Court revisited Mr. Carpio’s assertion that he specifically warned Mr. Avitia that he was not to shovel in the area where the accident later occurred, he reaffirmed that he told Mr. Avitia not to dig at the scene of the accident, although his specific concern was that Mr. Avitia not be injured from rock falling under the grizzly. Tr. 181. Mr. Carpio’s version of this event is not credible for many reasons including his admission that, though he had known Mr. Avitia for ten years, this was the only time such a conversation had occurred.. Thus, according to Carpio, in all those years he had no previous occasion in which he had warned Avitia not to do something. The one warning happened to occur on the day of the accident. Tr. 181-182.

Mr. Carpio’s explanation for his understanding that there was no need for a guard, that is,

Plant Superintendent Mike Harris, whom the Court found to be a credible and forthright witness, stated that Mr. Avitia's duties as an 'oiler' are to grease, oil, and do clean-up work and maintenance. Tr. 237. Avitia's clean-up duty includes spills, places on the rock crusher where dirt will accumulate. In general, Harris described this as shoveling, "keeping the plant side clean." Tr. 238. Spills, he agreed, can include rocks. Tr. 238. Mr. Harris also agreed that an oiler would need to use a shovel to dig out spills. An oiler would use a shovel to clean up accumulations that are under a conveyor. Tr. 241. It is important, Harris agreed, to keep the plant cleaned up as, if piles were allowed to build up, and get under the belt, "pretty quick [the] plant would be buried" and the belts would stop running. Tr. 241-242.

When Harris first arrived at the accident scene Mr. Avitia had been freed and was on the ground. Tr. 247. Harris stated that when he asked Avitia what happened, he responded : "I [messed up] guero." Tr. 256.<sup>12</sup> Harris later restated that Avitia admitted to him that he was trying to free a rock stuck against a belt. Tr. 406-407.<sup>13</sup> The Court accepts Harris' position that access to the

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that it was guarded "by location," if the distance between the between the ground and the moving part was 36 inches or less, was similarly questionable in that he first stated that the safety coordinator did not describe such a distance and that he knew it was 36 inches "because that's the distance from our conveyor." Tr. 183. The "conveyor" he was referring to was the location of the accident. As with his alleged warning to Avitia, Mr. Carpio stated that the safety coordinator had identified the "three feet" rule one time in five years, although he then backed away from that claim. Tr. 185. The pattern of conflicting answers continued when the Court inquired about other locations at the plant where the distance between a roller and the ground is less than 36 inches and whether those locations have guards. While at first stating that such areas did not have guards, he then stated that *some* return rollers did have guards, even if the space was less than 36 inches. Tr. 189. The Court, trying to figure out Mr. Carpio's statements on this issue, asked how it was determined to put a guard in some locations with less than 36 inches clearance but not others. Mr. Carpio responded: "I mean, we don't dig on spots that are dangerous. I don't know." Tr. 188. The Court accepts at least the last part of Mr. Carpio's statement: he doesn't know.

In the Court's estimation, Mr. Carpio was trying to support his company's position but he did not do this credibly. Based on the entire record, the Court concludes that the credible evidence is that the roller in issue *was not* guarded at the time of the accident and that Carpio *did not* warn Avitia that he was not to dig in the location of that roller. Further, the Court does not find credible Carpio's assertions that Avitia admitted to him the circumstances of the accident. Beyond those findings, it is noted that Carpio's claim that the roller in issue *was guarded* seriously undercuts the Respondent's claim that guarding by location applied to that circumstance.

<sup>12</sup> Actually, the ubiquitous and all purpose "f" word was, according to Harris, employed by Avitia, not the tamer "messed up" description substituted by the Court.

<sup>13</sup>On redirect, the Solicitor's Counsel tried to have the witness concede that as Avitia was in pain and on medication, his statement about the stuck rock was likely unreliable. Tr. 416. The Court rejects that contention and notes that the government did not recall Avitia to rebut the

return roller where Avitia was caught would only occur through a deliberate act such as to dislodge a rock. Tr. 366.<sup>14</sup>

Apart from whether Mr. Avitia exercised poor judgment, photographs 5 and 6, within Ex P 8, are an attempt made by the Respondent to show where Mr. Avitia's body was caught within the small space between the roller and the belt. Tr. 278. Harris, who is the person in those photos, positioned himself to show how Avitia was pinned between the roller and a piece of angle iron, described as a "cross member." Tr. 279-280. A clearer depiction of the same recreation of the point where Avitia became trapped by the roller is R-7, which is an enlargement of the same area shown in photos 5 and 6 within P 8.<sup>15</sup>

Harris agreed that the roller where Avitia was caught had no expanded metal guard on it. Tr. 294, 297. The Court finds that the return roller in issue did not have a guard. Ex P 9, shows, but not very clearly, photos of the expanded metal guard that was placed around the return roller after the event. Tr. 296, 364. Harris described the installed guard as "pretty much a standard return roll guard." Tr. 297. That guard, as installed for abatement, was about 51 inches in length and 3 to 4 inches tall and it covered the 5 inch roller. Tr. 298-299. However, Harris maintained that the same accident could occur, even with the guard that was placed over the roller to abate the citation. Tr. 299. This, the Court finds, was a bit of an overstatement. Harris stated that some contact could still occur as one could still touch the bottom of the front of the roller but he conceded that the expanded metal guard would prevent contact in the area it covers.<sup>16</sup> Tr. 427-428. If one were caught in the remaining unguarded gap, it was Harris' position that the expanded metal would "tear up" the person caught worse than if no guard was present. Tr. 300. Despite that concern about the effectiveness of the guard that was installed after Avitia's accident, Harris admitted that MSHA did not tell him to use an expanded metal guard to abate the citation and that it was the Respondent that came up with the guard design. Tr. 301.

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contentions made by the Respondent's employees.

<sup>14</sup> Harris asserted that Avitia should have simply radioed about the stuck rock and the grizzly belt conveyor would have been shut down for the removal of the rock and that the rock removal would only have taken minutes. Tr. 367-368.

<sup>15</sup> These photographs, particularly R 7, starkly display how fortunate Avitia was to have survived the event.

<sup>16</sup> Although, as noted, Harris believed that the guard that was installed on the return roller after Avitia's accident would not completely prevent one from getting caught up in the pinch point because the guard must still leave some space between it and the moving conveyor, that contention only demonstrates that a guard's protection is not absolute but it does not speak to the requirement for a guard. Tr. 361. A similar argument was advanced by Harris in contending that guards can sometimes create problems, as by trapping dirt. However, Harris himself rebutted the import of that assertion by acknowledging that there is still a need for guards to protect against incidental contact. Tr. 363.

Harris also stated that the company's policy does not require a lockout/tagout if one is shoveling beneath a conveyor.<sup>17</sup> Tr. 304. Further, he agreed that using a shovel to remove dirt accumulating from beneath a conveyor is a common activity. However, Harris distinguished that action from physically getting underneath the conveyor. Tr. 304.

Harris noted that some rollers are guarded at the site while others are not. He cited the overland conveyor's return roller as an example where there is no physical guard. Tr. 305. However, he noted that a "snubber roll[er]" is guarded and two rollers forward of that are guarded too, as both are accessible and therefor not guarded by location. Tr. 305.

Regarding the location where Avitia became caught, Harris agreed that R 6 depicts several guards on that tail pulley. As noted earlier, the left most guard covers the tail pulley and there is the long rectangular guard right behind Harris in the photograph. There is also a 'drop guard,' which is below the right end of the long, rectangular guard.<sup>18</sup> Tr. 318. All three of those guards were in place on the day of the accident. Tr. 319. Also, as previously noted, the return roller, where the accident occurred, is right behind Harris' legs, in R-6. Tr. 319. Harris noted that seven "troughing rollers" that is, rollers form the belt into a "U" shape, and which are on top of the conveyor belt, are guarded. They are guarded because they present a pinch point and they are guarded by the long rectangular guard shown in R-6.

In contrast, the return roller which ensnared Avitia is on the bottom side of the belt. Its function is to keeps the belt from sagging onto the ground. The return roller in issue is depicted in R 5 right above the 33" marking on the exhibit.<sup>19</sup> Harris described the return roller's location as "inside the frame bracket ... it's located up inside the frame ... the bottom of the roll is relatively flush with the bottom of the frame of the conveyor." Tr. 324. The 33 inch measure in R 5 records

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<sup>17</sup> R17, a multiple page exhibit, represents Avitia's training records. Tr. 370. It shows that Avitia had lockout/tagout training, which applies to lockout procedures for electrical components. Tr. 371-376, 512. Respondent's Ex 19 was identified by Olsen as the Company's lockout/tagout policy. Tr. 517. Olsen added that he would provide "site specific" training, identifying various hazards at the mine. Tr. 518-519. However, any argument that lockout/tagout applies is misplaced. The operator was cited for a guarding failure. There is no authority for an affirmative defense claim that a failure to follow such lockout tagout procedures impacts the alleged violation. Further, the operator did not present reliable evidence that it specifically required the shut down of equipment in the event of lodged material in its conveyor system. Nor was there evidence that lock out tag out applied where employees were cleaning up spillage from conveyors. Last, no signs or warnings were present advising employees not to work under conveyors.

<sup>18</sup>This is the guard which is hard to discern in the photos but, as noted, its presence does not play a direct role in the determination of the alleged violation which concerns only the return roller that ensnared Avitia.

<sup>19</sup>Harris drew a red arrow and added his initials to identify the return roller in issue. Tr. 324.

the distance from the bottom of the roll to the ground. Tr. 323. There is no dispute that the return roller in issue did not have a physical guard on it at the time of the accident. Tr. 325.

Representing the Respondent's central contention in this case, Harris considered the roller to be guarded by location because there is no "access" to it in the sense that one has to intentionally go that location to gain access. Incidental contact, in his view, could not occur. Tr. 326. Harris expressed his understanding of guarding by location as circumstances where "there's no way to access it or accidentally fall into it." Tr. 326. In support of this view, he noted that there are several other rollers that are low to the ground, meaning rollers located 36 inches or less from the ground and he asserted that such rollers have always been considered guarded by location. Tr. 327. Thus, Harris viewed guarding by location to apply to situations where one would have to take deliberate action to gain access. Tr. 327.

The Court agrees and finds as a fact that if one were to trip or fall in the area where Mr. Harris is standing in the photograph, R 6, no contact with the return roller could occur. As noted, it also rejects the Department of Labor's assertion that Avitia was shoveling dirt from the *outside* of the grizzly conveyor and only reaching as far under that conveyor as his shovel permitted, that is up to his shoulders, when he became caught by the return roller. Only Mr. Avitia's version supports the contention that he was working from outside that conveyor but the Court, upon consideration of Mr. Harris' testimony and others, concludes that scenario is incredible.<sup>20</sup>

Although Harris contrasted the accident location with working under the location of the tail pulley, as shown in R 11, and noted that Avitia *had* shoveled dirt from under there, it is worth noting that the access height to the area under the tail pulley is about the same as the site of the accident. Yet, it is significant to note that the tail pulley *is* completely guarded underneath it. In contrast the roller where Avitia was caught up was not so completely guarded.

Harris did not consider the rollers at the tail pulley as guarded by location because one "could duck your head down and walk underneath there, pick your head up. You could

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<sup>20</sup>Even Avitia did not exactly how it was that he was caught by the conveyor. He could not say whether it was his clothing or his shovel that contacted the conveyor. Tr. 62-65. It is far more likely that Avitia was trying to dislodge a piece of rock or some other lodged material when the accident occurred, as Harris noted that there was no dirt under the roller at the time of the accident. Tr. 339. The photographs don't make this absolutely clear, but in contrast to R 11, there is no pile apparent in R 6. In contrast, at least based on the photograph in R 7, rocks do accumulate under the roller, as shown by the pile of rocks on the left side of that photograph. Harris also stated that when he arrived at the accident scene and the conveyor belt had been cut as part of the effort to free Avitia there was "a rock on the bottom side of the belt, which that rock would have been stuck against the return roll and either the frame of the conveyor or a cross member in the conveyor." Thus, based on his experience and knowledge with the arrangement, Harris concluded that Avitia was "probably trying to free [a] rock while the conveyor was in motion." Tr. 343. All of this supports the Court's conclusion that Avitia had gone under the conveyor and was not outside of it and that his motive was to free a rock or some other material which had become lodged on the belt.

accidentally get into that, and that's why they're guarded." Tr. 332. The Court finds this reasoning to be flawed, or at least inconsistent, because one could also duck under at the location where Avitia was injured and that is exactly what the Court finds that he did. Once under the conveyor frame, as shown by R's Ex R 7, one could pick up his head and be subject to the roller's action, as happened to Avitia. In the Court's view, the Respondent's own exhibits, R 5, 6 and 7, undo its claim that the return roller was guarded by its location. R 6, with Mr. Harris standing at the point of Avitia's access, shows that the metal frame is at the top of his legs. That frame, as reflected in R 5, leaves a 33 inch access space but, of more significance than the measurement, R 7 shows how easily one can gain access to the return roller.<sup>21</sup> That same photo also shows the relative positions of Harris' buttocks and the conveyor I beam frame and it demonstrates that, while access would have to be intentional, it would require little effort to achieve such access by merely bending at the waist.<sup>22</sup> Ironically, the same photograph, R 7, shows guarding is present in the foreground, underscoring both the need for and the absence of guarding at the return roller.

Regarding the general assertion of guarding by location, Harris stated he considers "something that's way up in the air or way low to the ground . . . [as] guarded by location." Tr. 351. He deemed those locations as not requiring a guard because "you cannot access that. You know, there's no reason to access that." Tr. 352. However, the Court notes that *ability* to access a location is different from having a *reason* to access a location and that Harris seemed to blur the ability to access from having a reason to access an area. In this instance, Avitia had both a comparatively easy ability to access the return roller by simply bending at the waist. In terms of a reason to access the location, the Respondent has provided the most likely reason for Avitia's accessing it.

Although Harris maintained that there is some variation among the MSHA inspectors in terms of their view whether a guard is needed or not and that some inspectors would require guarding if a situation "might be accessible," in the Court's view, such variations in interpretation only potentially impact the penalty not the fact of violation.<sup>23</sup> Harris also conceded that at times it

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<sup>21</sup> Harris stated that it would be about 30 inches from the bottom of the frame of the conveyor at the location where he is standing in Ex. R 6. Tr. 403. The Court noted that R 5 shows, by that drawing, that it is 38" to the pinch point. Tr. 405. Harris felt it was more like 35" though he agreed that the drawing indicates 38". Tr. 406. As anyone can confirm with a ruler, an opening or space of 38 inches is a considerable height which would not pose a significant obstacle to easy access for most people.

<sup>22</sup>As Harris noted, one can shovel under the tail pulley because it "is completely guarded," as there is a guard *on the bottom* of the tail pulley. Thus, as shown in R 11, there is a complete box around the tail pulley. Tr. 333.

<sup>23</sup> In the same vein, Harris also claimed that when an MSHA inspector appeared at the accident scene the next day, the inspector expressed disbelief that anyone would go under the conveyor where Avitia did. Tr. 440. He also stated that the inspector agreed the area was guarded by location. Tr. 440. He further claimed that the area "was obviously in a location that wasn't

is simply a situation where a fresh set of eyes sees a guarding issue where others did not. Tr. 353-354. In one guarding citation instance described by Harris, the Respondent was cited where an employee, if he had long enough arms, could reach from a catwalk and get caught in the head pulley. Tr. 356. Harris noted that in that instance there was a guard present, but that it did not extend out far enough. In an attempt to show inconsistency on MSHA's part in applying the guarding standard, Harris stated that an unguarded return roller along the overland conveyor has never cited by MSHA. This location was identified in the background of R 7 and Harris stated that the conveyor height at that location was 32 inches. Tr. 358. Further, Harris estimated that there must be 15 such rollers along the overland conveyor that are similarly guarded by location. Tr. 359. Again, the Court views such inconsistencies as a distraction from the issue of whether the return roller in this case required guarding. Inconsistent application of the guarding requirement to other rollers is relevant, at most, only to the assessment of any penalty if a violation is found.

Manuel Torres, a loader operator at the mine, was also called as a witness for the government.<sup>24</sup> Tr. 193. He estimated once or twice a day, it is necessary to dig around the crusher, the jaw and the belts. This occurs when dirt falls from the belts and it requires digging under the tail and head pulleys so that the dirt doesn't pile up too close to the belts. Tr. 195-196. Such spillage also occurs around the return rollers. Tr. 196. He stated that in the past he has seen workers cleaning close to the belts, but he added that "nobody is supposed to be under the belts." However, he added that one can use a shovel and clean piles under the belt while the belts are running and this can be done safely. Tr. 200.

Accordingly, the testimony of Harris, Torres, and even Mr. Carpio, support the finding that shoveling around and under conveyors is a necessary task at this operation. Certainly, Avitia was doing that work around the tail pulley and around the return roller on the day of the accident although the specific activity that caused him to become ensnared by the return roller came about as a result of his effort to dislodge a rock or some other material which had become lodged between the belt and the roller.

The government also called Benny Lara as a witness. Lara was the supervisor for the

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accessible." Tr. 441. Still Harris was told that a citation would likely be issued, but with 'low negligence' attributed to it because of its inaccessible location. Tr. 442. These claims, even if assumed to be true for the sake of argument, have no impact upon the Court's task of determining if the standard was violated.

<sup>24</sup> Mr. Torres was the first to arrive at the accident scene. Tr. 203, 224. This was prompted when he noted that the belt had stopped. He then called to have the power shut down. Tr. 201. When he arrived at the accident scene, he found Mr. Avitia "trapped in between the roller and the belt." Tr. 202. Mr. Torres marked on Ex R-6 the approximate location where he found Mr. Avitia, indicating the location with his initials, "MT." He added that Mr. Avitia was found just to the left of the man in the photograph, which is Ex. R-6. Tr. 212. Later, Mr. Torres stated Mr. Avitia was "directly behind" the person in the photograph. Tr. 214. Thus, Torres' account supports Harris' testimony as to the location where Avitia became ensnared.

Albuquerque field office at the time of the accident at the Respondent's mine and it was he who assigned Mr. Cisneros to conduct the MSHA investigation of the accident.<sup>25</sup> Tr. 540-541. Lara's testimony was limited in its scope. Chiefly, he testified about the guarding standard in issue, 30 CFR 56.14107(a), noting that the only exception in that standard is for moving machine parts above seven feet, and, emphasizing that point, he noted that there is no corresponding exception within the standard for moving machine parts that do not need a guard because they are too low.<sup>26</sup> Tr. 544.

Aaron Fitting was called as a witness for the Respondent. Fitting is the operations manager for Mainline Rock, which is a subsidiary of Yukon. Tr. 568. Regarding the moving machine part violation Fitting could offer little about the accident itself, because he did not arrive at the scene until the day after the accident. Further, the Court has already determined, on the basis of testimony from those who were there that day, what happened. Apart from the exact circumstances of the accident, Fitting was able to offer some useful information about guarding at the Torrance Mine.

Fitting stated that he built the crusher at the Torrance mine. Tr. 571. The arrangement however is not fixed in the sense that, as mining progressed, conveyors would be added as the hole in the ground grew. Tr. 573. His work included installing guards. The decision to install guards is based in part on written information and in part on experience. Tr. 574. As Fitting expressed it, "Like tail pulleys have to have guards, B belts have to have guards, drive belts have to have guards, flywheels have to have guards. Anything that a person can - - incidental contact, *get to*, we guard." Tr. 574 (emphasis added).<sup>27</sup>

Fitting also stated that the decision to guard does not take into account whether a miner could stick something, such as a tool, into a pinch point. Rather, the focus is upon whether one could trip or fall and make contact through such an event. Tr. 593-594. Yet, Fitting stated he was aware that miners would clean underneath conveyors using a shovel or a rake to pull dirt out from under a conveyor and that the task was sometimes done from a kneeling position. Tr. 594. However, Fitting did not believe such contact could occur 'accidentally' while performing those cleaning tasks such as with a shovel. Tr. 595.

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<sup>25</sup> Lara testified because Cisneros had since retired. Tr. 533.

<sup>26</sup> Respondent elected not to conduct any cross-examination of Mr. Lara. Tr. 557.

<sup>27</sup> Fitting stated that the determination whether to add a guard is based on experience and through MSHA inspections and talking with those inspectors. Tr. 573. He also made claims that MSHA would always issue such a citation when an accident occurs but such comments are simply a distraction from the Court's task of determining how the accident occurred and whether the standard was violated. For the same reason, Fitting's particular understanding of guarding by location, and that the standard protects only against accidental or inadvertent contact, is not relevant to determining whether there was a violation. He did not deny that such rollers can pose a hazard, agreeing that MSHA fatalgrams have noted that miners have been pulled up into return rollers. Tr. 584.

Accordingly, on the basis of the findings above, the Court concludes that 30 C.F.R. § 56.14107(a) was violated. The return roller in issue was a moving machine part of the type covered by the standard. Indeed the Respondent does not contend that the standard does not apply to such rollers but instead that it does not cover intentional or deliberate action and that it was guarded by its location. However the Court finds that it was a normal part of Avitia's duties to clean up and shovel material which would be deposited around the conveyors. Such deposits occur continually and as an inevitable part of the mining process. It was also not uncommon for rocks or accumulated debris to become caught in the conveyor system and some sort of blockage occurred here. That blockage prompted Avitia to make the unwise decision to free the stuck rock or material using his shovel, with the ensuing accident.<sup>28</sup> The critical point however is that the return roller was easily accessible and certainly did not require "crawling" to gain access to it. As the Court has noted, the Respondent's own photos show both the relative ease of access and the very hazardous nature of that moving part. There is in fact, in terms of ease of access, only relatively minor differences between the fully guarded tail pulley and the return roller which ensnared Avitia. Even if there had been a written policy advising that conveyors were to be shut down when material became lodged, the issue of required guarding would be the same because, as the Commission has noted in *Thompson Bros. Coal Co.*, inadequate guarding issues must be resolved on a case-by-case basis, which is to include "all relevant exposure and injury variables" which includes "the vagaries of human conduct." 6 FMSHRC 2094, 2097 (Rev. Comm. 1984). Here, Avitia responded in a manner that would not be difficult to predict. He was working in the area, performing the directed clean up activity around the grizzly conveyor, when the rock or other material became lodged and he chose the expedient means to try to solve the problem by sticking his shovel at the lodged material in an attempt to free it. The impediment to access the return roller was minimal and insubstantial; simply bending over at the waist, not crawling, afforded access. Once within the conveyor frame, as Respondent's photos show, one was then able to stand erect or nearly so to access the return roller. Like the nearby tail pulley, which the same photo shows was guarded, the return roller needed a similar style guard.

It is true that Fitting believed that guarding by location can exempt the need for installation of a physical guard, and on that basis expressed the view that, as here, a "roller [] sucked up inside [a] frame," is one such example, because [i]t's not visible, unless you crawl under the belt," [and therefore] [y]ou couldn't fall onto it. It's not a travelway. You couldn't stand up into it with your head. If you trip, there's no way to get to it. . . .you can't fall down it. [One] can't walk by and lean on it. It's guarded up inside by the frame." Tr. 604-605. There are several problems with this

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<sup>28</sup> Using R 6 as a reference, Harris stated that where he is standing in that photo, at the location of his legs, is the point where Avitia would have been when he got caught in the roller. Of course, he would have been underneath the beam frame at that time, under the belt. Harris stated that it would not have been possible to have been caught up in the roller at some point to the right of his position in R 6. That is, the only location where the accident could have occurred is at the point where he is standing in that Exhibit. Tr. 410. Harris' explanation of the point of entry is the only one that makes sense. Therefore the Court finds that Avitia did get snagged in the pulley at the location as Harris described and not at some point to the right of that location. The reason for this is that, as Harris pointed out, if Avitia had somehow entered at an earlier point he would have been on top of the belt and he would have ended up at the tail pulley with fatal consequences. Tr. 411-412.

view. Notably, the standard only provides an exception where the exposed moving parts are at least seven feet away from walking or working surfaces. The Respondent has not claimed nor is there any evidence that the seven foot rule obtains here. Further, as noted, one *would not* need to crawl in any sense of that word, to gain access to the roller and, again as Respondent's own photos show, one *could*, and indeed Mr. Harris did, stand up once having moved under the conveyor frame.

Harris conceded that there are no signs warning employees not to work in front of the grizzly conveyor nor other forms of notice to stay away from the area.<sup>29</sup> Tr. 422. The Court finds that digging around conveyors was a common and necessary practice and that the operator did not have any signs or barriers warning employees walking or working near exposed moving parts to stay seven feet away from them.

Although the Respondent has contended in its Post-Hearing Brief<sup>30</sup> that the standard in issue, 30 C.F.R. § 56.14107(a), does not apply to conveyor belt rollers, part of its effort to make this claim rests upon improperly describing an MSHA Program Policy Manual ("PPM"). In this regard, Respondent asserts that the PPM "specifically states the 'similar moving parts' language of § 56.14107(a) does not apply to conveyor belt rollers. It then quotes from that PPM, advising that it provides: "Conveyor belt rollers are not to be construed as 'similar exposed moving machine parts' under the standard . . ." R's Br. at 6. In the Court's view, this description was misleading.

As the Secretary points out in her Reply Brief, Mainline truncated its quote of the PPM. The very important full quotation provides:

Conveyor belt rollers are not to be construed as 'similar exposed moving machine parts' under the standard and cannot be cited for the absence of guards and violation of this standard where skirt boards exist along the belt. However, inspectors should recognize

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<sup>29</sup> Harris maintained that Avitia was specifically warned not to work in the accident area. Tr. 423-424. The Court finds that while Harris was an credible and honest witness, such a statement indicates an awareness of the ease of access to the dangerous moving machine parts. Harris also admitted to a disincentive to install such guards as they tend to trap the inevitable material which falls from the conveyor. This works eventually to clog the conveyor instead of the guardless situation where the material falls directly to the ground. A guard, in short, can hinder production because of its tendency to collect the falling material within it. That means, periodically the conveyor would need to be shut down, and the accumulated material removed from within the guard. As noted earlier, it is important, Harris agreed, to keep the plant cleaned up as, if piles were allowed to build up, and get under the belt, "pretty quick [the] plant would be buried" and the belts would stop running. Tr. 241-242.

<sup>30</sup>Respondent elected to stand on its initial brief and not file a response brief.

the accident potential, bring the hazard to the attention of the mine[] operator, and recommend appropriate safeguards to prevent injuries.

Secretary's Reply at 2.

It is undisputed that no skirt boards were present at the location where Avitia became ensnared by the return roller. Accordingly, Respondent's Counsel is reminded that there is an obligation of candor toward the tribunal.<sup>31</sup>

The Respondent also asserts that, as the return roller is not one of the eleven listed specified components in the standard, the standard is ambiguous as to such application. On that premise, that there is ambiguity, it continues that, under such circumstances, to be supported, the Agency's interpretation that a non-listed part is included must be reasonable. Referring again to the PPM and to the text of the standard itself, Respondent asserts that it is not reasonable. R's Br. at 6-7. Citing *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Rev. Comm. 1984)<sup>32</sup> and the PPM yet again, the Respondent notes that the PPM also states:

This standard is to be cited when a guard at conveyor locations does not extend a distance sufficient to prevent any parts of a person from accidentally getting behind the guard and becoming caught, or in those instances when there is no guard at the conveyor-drive, conveyor-head, conveyor-tail, or conveyor take-up pulleys.

R's Brief at 8 (emphasis inserted by Respondent).

With those contentions in mind, Respondent cites *Sangravl Company, Inc.*, 30 FMSHRC 1111 (ALJ 2008) where the administrative law judge vacated the citation upon finding that the

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<sup>31</sup> See, for example, *Harrington v. City of Albuquerque*, 222 F.R.D. 505 (2004) in which counsel was criticized for omitting the introductory clause of a sentence quoted in its brief. The truncated quote there was taken out of context and therefore was misleading. Whether intentional or unintentional, misleading or selective quotations are not helpful to any court. *Unitherm Food Systems, Inc. v. Cooper & Co.*, 2010 WL 2347040 (N.D. Okla. 2010).

<sup>32</sup> In the Court's view, *Thompson Bros. Coal Co.* does not assist the Respondent's contentions. As Respondent notes, the Commission stated that the standard applies where there is a reasonable possibility of contact and that assessment of that is to include "ordinary human carelessness." Further, the Commission stated that inadequate guarding issues must be resolved on a case-by-case basis, which is to include "all relevant exposure and injury variables" which includes "the vagaries of human conduct." R's Br. at 7, quoting *Thompson Bros.*

chance of inadvertent contact was extremely unlikely as there was no evidence that the roller was worked on while it was running.<sup>33</sup> Here, however, the Court notes that the accident occurred and there is uncontroverted evidence that work was performed at the roller while it was running. Although the Court agrees that the roller was inaccessible to accidental contact, it still concludes, for the reasons stated within, that the standard applies in this case. Similarly, while arriving at a different conclusion from the Respondent as to the standard's applicability, the Court finds that Avitia purposefully stuck his shovel near the moving roller in order to remove a rock. This is because the moving machine part, the return roller here, was of the class of such moving parts that, when not guarded, can, and in this case did, cause injury. In fact, the very PPM that Respondent would have the Court pay heed to, can be fairly construed to instruct that such belt rollers are exempt from the standard only when there are skirt boards present.

It also seems that the Respondent interprets the PPM too liberally when it asserts that it "states specifically that 30 C.F.R. § 56.14107(a) is intended to address the prevention of accidental contact with moving machine parts." The portion of the PPM Respondent refers to actually provides that:

This standard is to be cited when a guard at conveyor locations does not extend a distance sufficient to prevent any parts of a person from accidentally getting behind the guard and becoming caught, or in those instances when there is no guard at the conveyor-drive, conveyor-head, conveyor-tail, or conveyor take-up pulleys.

Two observations are made about the PPM in this regard. First, the return roller, it has been found, was not guarded at the time of the accident. Therefore, the PPM language about "accidentally getting behind the guard" is applicable. Second, as it was not guarded, the second part of the quoted language, next above, only cites examples of unguarded pulleys. In contrast, the standard itself is not so limited as it protects against moving machine parts that can cause injury by requiring guards to protect persons from contact with such moving parts.

Respondent alternatively submits that the citation should be vacated because it was not provided with adequate notice that a guard was required for the cited roller. Under this argument Respondent asserts that the standard in issue is so vague, incomplete, indefinite or uncertain that people are left to guess as to its meaning and application. To support this claim, Respondent notes that no MSHA inspectors believed that the return roller required guarding. Respondent points to the testimony of Harris that an MSHA inspector had advised him that a different return roller on the Quarry's Overland conveyor was guarded by location as it was close enough to the ground so as to be inaccessible. Respondent contends that the testimony of Aaron Fitting and MSHA supervisor Lara support this contention as well. As Mainline would have it, the prior identification by MSHA inspector Gutierrez of some 20 to 30 locations where he identified a need for guards should be the

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<sup>33</sup>Administrative Law Judge decisions have no precedential effect and are useful only to the extent that the underlying reasoning is adopted by another administrative judge in the case being litigated.

last word on the locations where guards were needed at the mine. In connection with its claim of lack of notice, Respondent cites *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995 (Sept. 2001) (“*Good Construction*”) for the test to be applied in determining whether a reasonably prudent person would have notice of a standard’s requirements. Applying that test, Respondent maintains that such notice was not provided. R’s Brief at 12.

In sum, Respondent maintains that the standard is vague and broadly worded, that the PPM provisions contradict the Secretary’s position in this litigation and that MSHA had not issued any prior violations for unguarded bottom rollers in its previous inspections. All of this adds up, in Respondent’s view, to a lack of fair notice. For the reasons set forth in this decision, the Court rejects those contentions.

The Court agrees with the Secretary that the citation issued for the violation of 30 C.F.R. § 56.14107(a) applies to the return roller in issue and that the violation was significant and substantial. The Court has determined that the violation occurred and clearly the absence of the guard for the return roller contributed to the discrete safety hazard of Avitia’s being caught in the return roller. Serious injury not only would be likely in such an event, but also the facts of the accident confirmed that to be the case. Avitia was extremely fortunate to have survived the event.<sup>34</sup>

Turning to the issue of negligence, the Court concludes that the operator knew or should have known of the violative condition or practice and that no mitigating circumstances were

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<sup>34</sup> Respondent asserts that the Secretary failed to introduce evidence regarding the size of the Respondent and the mine’s violation history. R’s Br. at 18. Given that the administrative law judge must consider the Section 110(i) penalty criteria in assessing any penalty and, consistent with that, make findings of fact and conclusions of law as to each of the statutory penalty criteria, it is Respondent’s argument that the absence of any evidence of those two penalty criteria means that the Secretary failed to establish a prima facie case supporting the imposition of a civil penalty and that, as a consequence, the civil penalty assessment must be dismissed.

In response, the Secretary notes that the parties agreed at the hearing that it would supplement the record with a certified mine history report post-hearing and that this occurred on December 16, 2010, with that report designated as Exhibit P 1. As to the size of the mine operator, Exhibit A was included as part of the civil penalty petition. That Exhibit A listed the mine hours and the controller hours and it reflects the points assigned for those. Last, it is noted that the Respondent did not deny the listed mine hours, controller hours, nor the points assigned to either based on size. This should not be surprising, the Secretary notes, as the mine is the source of this information which is provided to MSHA. The Court agrees and rejects the Respondent’s claim regarding penalty criteria.

present.<sup>35</sup> The Court agrees that, relevant to this issue, is the fact that the Respondent was advised about two months before the accident of the need to guard some 20 to 30 return rollers.<sup>36</sup> Tr. 600. The record supports the conclusion that the configuration of the conveyors was changed after that, but even if that had not occurred, MSHA's identification of specific rollers in need of guards does not insulate an operator from the duty to assess the need for guards at every location where moving machine parts may be contacted and cause injury.

The Court does not subscribe to the claim that MSHA has permitted guarding "by location" as applying to circumstances such as those that obtained here. The standard itself speaks to the only recognized exception, the situation where exposed moving parts are at least seven feet away from walking or working surfaces.<sup>37</sup> There is neither a contention nor evidence of record to support the application of the exception here. Indeed one would be hard pressed to explain how it was clear that the tail pulley so obviously needed to be guarded but yet the return roller, with nearly the same access, did not.<sup>38</sup> Again, the Respondent's own photographic exhibits make this plain.

Nor would any contention that because MSHA had identified a number of rollers in need of guards, those not so named would not need them. It is the operator's, not MSHA's, responsibility to identify such moving machine parts.<sup>39</sup> Given the testimony that conveyor belt clean up is a routine and continuing task, the operator's negligence is properly characterized as high.

On the basis of the entire record, the Court affirms the appropriateness of the \$60,000.00 penalty, as specially assessed<sup>40</sup> for this section 104(a) citation. The violation, per the standard set

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<sup>35</sup>Though not present here, if the conveyor frame had been significantly lower so that an employee such as Avitia would need to crawl under it to gain access, whether there was a violation would have been in issue and at a minimum mitigating factors would need to be addressed in such circumstances.

<sup>36</sup>Respondent believes the prior identification helps its position. The Court does not as such an estoppel theory does not obtain.

<sup>37</sup>Thus, there is no "three foot" rule exemption to this guarding standard.

<sup>38</sup>Indeed, were it not for the other incredible claims made by Respondent's employee, Mr. Carpio, having the effect of discounting his testimony overall, his claim that the return roller *was* guarded would establish that the Respondent knew there was a need to guard that roller.

<sup>39</sup>Accordingly, it is unnecessary for MSHA to show that the operation's conveyor configuration had changed since the time the Agency had identified certain rollers in need of guards.

<sup>40</sup>MSHA's Lara also noted that there was a 'special assessment' for this violation, and that such assessments come about where the violation is of a 'serious nature' and where operator negligence may be involved. As an example, Lara stated that where an employer knew that an employee was working around an unguarded moving machine part, a special assessment may be

forth in *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), was significant and substantial. The Court has found that the cited standard was violated, that the absence of the guard presented a distinct safety hazard contributed to by the violation, that the hazard in fact contributed to the resulting injury and that the injury was of a serious nature. In addition, there was high negligence here, as the Respondent was aware of the hazard, knew that clean up was necessary around the conveyors and knew that material becoming lodged in the conveyor was a common and expected problem endemic to the operation and had guarded similar rollers and guarded the adjacent tail pulley.<sup>41</sup>

#### **B. Failure to Notify MSHA; the alleged violation of 30 C.F.R. § 50.10.**

Essentially, MSHA established this violation through the testimony of Dwayne Olsen. Olsen is Mainline's lowdown superintendent at the Torrance Quarry. He also handles compliance issues and paperwork at the Torrance Quarry. Tr. 453. He was at the site on the day of the accident. He drove his truck to the accident site, which was only a minute away. Tr. 459. When he arrived there, Avitia was on the ground being attended to by two employees. Olsen remained at the scene for only a few minutes before leaving. Tr. 460. He left because he was one of the individuals who had to make telephone calls. Tr. 461. Based on his quick view of Avitia, Olsen did not think Avitia had been seriously hurt, even though he understood that he went through the return roller. Tr. 462. He then drove to the mine office to make the calls. Although he stated that his first call was to 911 and that, after that, his call sheet directed that calls be made to the sheriff or state police, it was pointed out to him that, in his deposition, Olsen stated he first tried to contact corporate officials Mike McKinney and Vern Scoggin<sup>42</sup> to inform them of the accident and to advise them that they were getting a helicopter for Avitia. Tr. 465-466. So, Olsen in fact first called the corporate office. Tr. 467. Yet, at the time he called the corporate office, Olsen was aware that Avitia needed medical attention. Tr. 468. He also called 911 informing them of the accident and the need for an ambulance. Tr. 468. By Olsen's own estimate, all of his calls took less than 30 minutes. Tr. 472.

Subsequently Scoggin returned Olsen's call and he asked if Olsen had called MSHA. Olsen

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made. Tr. 545. Lara stated that the investigating MSHA inspector would make a determination of the negligence involved, and incorporate that in the citation that was issued. Tr. 546. Lara later reviewed the investigator's recommendation that there be a special investigation and concurred with that conclusion. Tr. 547.

<sup>41</sup> Strictly as a procedural matter, it is noted that Exhibit P 11 was mistakenly included with the transcript provided by the court reporter, but that exhibit was withdrawn by the Secretary, as that document refers to idler rollers, not the return roller in issue here. Tr. 552.

<sup>42</sup> Olsen remembered that, as he could not reach Scoggin, he called McKinney. Tr. 470. McKinney is the Respondent's in-house counsel. Scoggin is the company's compliance officer in Spokane, Washington. Tr. 473.

told Scoggin that he had not made that call because he didn't feel there was a need to do so at that time, in that the criteria to require such a call had not been met. Tr. 474. He based this on the fact there had not been a death, he did not feel death was imminent, and the injured had not been trapped for 45 minutes. Tr. 475. However in the 30 minutes that then elapsed Olsen made no further inquiries as to Avitia's condition. Tr. 476, 479. He then called the owners of the property, that is, the lessors of the land to the Respondent. Tr. 476. Olsen also received a call from Brian Deatly, the mine owner. Mr. Deatly asked if Olsen had called MSHA, and also advised Olsen to make that call. Tr. 478. But, Olsen did not make the call to MSHA after concluding his call with Deatly. Tr. 481. Olsen did not make the request for a helicopter for Avitia but he conceded that once he learned a helicopter was on the way, he knew that the matter was more serious. Tr. 480-481.

Eventually Olsen did call MSHA at about 2 p.m. or 2:35 or 2:37. He could not recall exactly the time of the call. Tr. 482. This call was made *after* the helicopter had departed. Tr. 482. Olsen continued to maintain that he did not feel the criteria to make the call within 15 minutes had been met. Tr. 483. Yet, he did not feel his call could wait until the next day because "an individual [had been] hurt." Tr. 484. According to Olsen it did not dawn on him about the seriousness of Avitia's condition until the helicopter EMT told him that Avitia was in "tough shape."<sup>43</sup> Tr. 485. Ex P 10 is an MSHA form that Olsen filled out, which documents the date he completed it. Tr. 488. Under questioning by Respondent, Olsen was directed to Exhibit R 12, which reflect his notes, made the night of the accident. Tr. 491. Olsen agreed that, once he became aware of the extent of Avitia's injuries, he did place the call within 15 minutes of that. Tr. 493. He reiterated that, when he first saw Avitia, his believed that his injuries were not life threatening. Tr. 494. The only location for calls to be placed reliably was at the mine office. That office is really a storage container that was converted to serve as an office. Tr. 495. While at that office, making calls, he did receive a call from an employee who was with Avitia and who inquired when the ambulance would be arriving. Tr. 496. But, Olsen maintained that he did not inquire how Avitia was doing when the employee called. Tr. 497. Still, while he knew an ambulance was on the way, he did not consider the situation life threatening. At any rate, Olsen maintained that he did not know of the seriousness of the situation until the paramedic with the helicopter so advised him. Tr. 498.<sup>44</sup>

Aaron Fitting's testimony<sup>45</sup> was informative as to the violation stemming from the failure to report the accident to MSHA. Fitting stated that on the day of the accident he received a call from Dwayne Olsen and during that call he inquired if Olsen had called MSHA. Tr. 569. Although Fitting testified that Olsen told him that he didn't think there was anything wrong with Avitia and thus there was no need to call MSHA, Fitting told him he should still call MSHA. Tr. 569. After

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<sup>43</sup> The Court accepts Mr. Olsen's testimony that he did not *intentionally* wait to call MSHA until after he had called corporate heads. Tr. 523-524.

<sup>44</sup> R 12, Olsen's August 13, 2009 memo to Mainline's Counsel was admitted into the record. Tr. 511.

<sup>45</sup> Fitting, as noted earlier, is the operations manager for Mainline Rock.

that, Fitting stated that it was his understanding that Olsen then talked to the paramedics and after that, called MSHA. Olsen then called Fitting again to report that he had called MSHA. Tr. 570. Fitting agreed that when he heard from Mr. Harris the first time about the incident he could have, but did not, direct that MSHA be called. Tr. 586. On re-direct, Fitting, in attempting to explain his failure to make a call to MSHA, agreed he wasn't at the site so his knowledge of Avitia's condition was very limited. Tr. 599.

Regarding the alleged violation of 30 C.F.R. § 50.10, as set forth in Citation No. 7885927, Respondent acknowledges that, pursuant to that section there are specific types of accidents that must be reported immediately, that is, within 15 minutes of the accident. R's Br. at 13-14. Respondent cites *Newmont USA Limited*, 32 FMSHRC 391, (2010), an administrative law judge decision, in support of its position that the event in this case did not have a reasonable potential to cause death. Of course, the particular facts in *Newmont* are entirely different from this matter, so the value of citing that case is minimal. Certainly the Court agrees with the Respondent's contention that an injury, by itself, does not trigger the reporting requirement. Rather, the key determinant is when the injury presents a "reasonable potential to cause death." Nor does the Court take issue with Respondent's contention that the particular circumstances and conditions at the accident site control the outcome and that, in fairness, there must be "a degree of discretion" afforded to the operator's determination of the need to report any given accident. R's Br. at 16. Still, as the Respondent observes, the Commission has stated that the while the operator must have a reasonable opportunity for its investigation of an event, that must be "carried out . . . in good faith and without delay and in light of the regulation's command of prompt, vigorous action." *Id.* at 16, citing *Consolidation Coal Company*, 11 FMSHRC 1935, 1938 (Rev. Comm. 1989).

Examining the particular facts, Respondent asserts that Olsen called 911 within minutes of the accident "and took action to implement Mainline's procedures to provide Mr. Avitia with the best post-accident care he could."<sup>46</sup> Respondent maintains that Olsen acted reasonably, deciding that MSHA did not need to be notified immediately "based on [Olsen's assessment of] the condition of Mr. Avitia a few minutes after he was injured." R's Br. at 17. Further, Respondent contends that "once Mr. Olsen learned the nature of Mr. Avitia's injuries, [he] notified MSHA within 15 minutes." *Id.* At bottom, Respondent contends that Respondent was not aware of the severity of Avitia's condition until the EMT informed Harris and Olsen of that. R's Br. at 18.

The Court realizes that it would not be fair to simply look at the facts months later and then pronounce what the proper response should have been and it does not do so here. On the other hand, it is fair to characterize Olsen's behavior as remarkably non-inquisitive about Avitia's condition and injuries. Based upon all of the facts known to Olsen at the time and those facts he could have developed with minimal additional inquiry, it is clear that a reasonable person would have concluded that the call was required at the time Olsen viewed Avitia at the accident scene. One does

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<sup>46</sup>While the call was made to 911, the claimed other action Olsen "took [] to implement Mainline's procedures to provide Mr. Avitia with the best post-accident care he could." is not supported in the record.

not have the discretion to remain uninformed about the circumstances of the accident and then assert that the reasonable potential for the accident to cause death was unknown.<sup>47</sup>

Accordingly, based on the above findings and discussion, the Court finds that the cited standard was violated and that the time starting the obligation to call MSHA began when Olsen first arrived at the scene of Avitia's accident. Thus, the Court finds that at least an hour and a half elapsed after the time for the required call to MSHA had passed. The negligence under these circumstances was high, not moderate. Because the negligence was high, not moderate, the Court modifies the citation to reflect that and increases the penalty to \$6,000.00.

### **Civil Penalty Assessment**

Based on the findings above, the Court assesses a civil penalty in the total amount of \$66,000.00.

### **ORDER**

Within 40 days of the date of this decision, Mainline Rock and Ballast, Inc., Respondent, **IS ORDERED** to pay a total civil penalty of **\$66,000.00** for the violation of 30 C.F.R. 14107(a), as set forth in Citation No. 7885926 and for the violation of 30 C.F.R. 50.10, as set forth, and as modified by the Court, in Citation No. 7885927. Upon payment of the civil penalty, this proceeding **IS DISMISSED**.

William B. Moran  
Administrative Law Judge

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<sup>47</sup>The Respondent asserts that MSHA's preamble to the final rule for the 15-minute notification requirement supports its position. In this regard, it cites that preamble's discussion of the situation where one had to choose between saving a miner's life and calling MSHA and the Agency's acknowledgment that such a choice would constitute extenuating circumstances for enforcement purposes. The problem with that reference is that no such dire choice was present in this case. Ultimately, the Court agrees that the determination whether the call is required is to be "based on what a reasonable person would discern under the circumstances." R's Br. at 18, citing Preamble to notification rule's reference to the Commission's decision in *Cougar Coal*, 25 FMSHRC 513 at 521 (September 5, 2003).